IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 21, 2005 Session

STATE OF TENNESSEE v. KEITH WRADY

Direct Appeal from the Circuit Court for Montgomery County
No. 40400016 John H. Gasaway, III, Judge

No. M2004-02732-CCA-R3-CD - Filed August 15, 2005

The defendant, Keith Wrady, appeals the Montgomery County Circuit Court's denial of probation following his guilty plea to the offense of failure to appear, a Class E felony. He argues that the trial court improperly weighed statutory mitigating and aggravating factors and failed to consider all relevant factors when ordering him to serve his sentence in the Department of Correction. We affirm the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Jeffry S. Grimes, Clarksville, Tennessee, for the appellant, Keith Wrady.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; John W. Carney, Jr., District Attorney General; and John Finklea, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On January 6, 2004, the defendant was indicted for failing to appear in court for the offenses of burglary, theft of property, and evading arrest. Thereafter, on August 12, 2004, the defendant pled guilty to the offense, agreeing to a four-year sentence as a Range II multiple offender, but leaving the manner of service to the discretion of the trial court. At a subsequent sentencing hearing, the defendant, his wife, Melissa Wrady, and his minister, James Volpe, testified. Thomas Salee, Jr., a bondsman in Montgomery County who posted the defendant's initial bond, testified for the State.

The defendant testified that he had completed dive training at the "Diver's Academy" and had obtained a job in the field. He stated that his employer was "ready for [him] to come back to

work just whenever [he] can get this matter settled." The defendant also stated that he had "found Jesus Christ as [his] personal savior, and [he was] looking to strive for a better life."

On cross-examination, the following colloquy occurred:

[The State]	Let's be candid . . . if one looked at your record alone, no chance in heck you deserve any type of probation; do you?
[The defendant]	No, sir.
[The State]	From 1990 until 2002 it's just regular in and out; right?
[The defendant]	Yes, sir.

The defendant's wife testified that, while the defendant was working, she was incarcerated for a violation of her probation. She testified to having no job skills and to relying on the defendant for financial support.

The defendant's minister testified to seeing a "dramatic change" in the defendant. He testified, "as we studied together you see the love of God in his heart. And it's not just a jailhouse religion. It's concrete."

Thomas Salee, Jr., testified that in consequence for posting the defendant's bond, he has "been out of seventy-five hundred dollars for paying . . . bounty hunters to locate him." He stated, "if we hadn't got him back here I would have been out seventy-five thousand dollars. But we was fortunate enough to locate him, and I'm out seventy-five hundred dollars as we speak . . . . That's why I got a failure to appear on him."

At the close of the sentencing hearing, the defense argued that three mitigating factors applied: (1) the defendant's criminal conduct neither caused nor threatened serious bodily injury; (2) the defendant was motivated by a desire to provide necessities for his family and himself; and (3) his entry of a guilty plea sufficed as "any other factor consistent with the purposes of this chapter" pursuant to Tennessee Code Annotated section 40-35-113(13). The defense specifically asked the trial court "to provide for supervised [release]."

The trial court stated:

> The presentence report indicates that at age 20 [the defendant] was convicted of assault, evading arrest, a second count of assault, a D-U-I. That D-U-I was when he was 22. When he was 23 evading arrest, driving without a license, possessing marijuana. Driving without a license at the age of 24. . . . Receiving stolen property, receiving stolen property, theft of property at 25, theft of property, theft, burglary, theft, burglary.

At 26 something out of Kentucky called promoting contraband. I'm not sure what that means. Traffic offense. Theft of property at 30. Theft of property at 32. Possessing drugs.

He was tried by this Court and remained on the bond that he was on pending sentence and then he left.

[The defendant] is not someone who the Court believes will ever follow the rules and regulations. He's convinced me today that he's actually found a job that he likes. He's proven that. I give him that. I believe that he does like his job; I believe he would love to go back to work, and maybe because he has found a vocation from now on in the future he will stay out of trouble. But he's got to pay for his past.

Whether or not he has become a religious man, for some people that would be important to the Court, but not [the defendant]. I don't judge him one way or the other about his religion, but assuming that it is true, again, maybe that will help him as he goes on the rest of the journey of his life, but he's got to pay for his past.

With this history there's no doubt in the Court's mind that [he] has to be confined for his sins, if you will, of the past. Manner of service is confinement at the Department of Corrections [sic].

From this determination, the defendant appeals.

Analysis

In this appeal, the defendant challenges the trial court's order that he serve his sentence in confinement. He argues that the trial court improperly weighed any statutory enhancement factors and failed to consider applicable mitigating factors in denying probation. When a defendant challenges the length, range, or manner of service of a sentence, this Court employs a *de novo* review with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the sentencing principles of the 1989 Sentencing Act, this Court may not disturb the sentence even if a different result is preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

The defendant cites State v. Carter, 986 S.W.2d 596 (Tenn. Crim. App. 1998), to argue that this Court "sits in de novo review" absent the presumption of correctness because the trial court failed to weigh any statutory mitigating factors and improperly considered any enhancement factors. In Carter, "the sole issue . . . [was] whether the trial court erred in determining the length of the sentence." Id. As stated in Carter, procedurally, a trial court should start at the minimum sentence

when determining a Class B, C, D, or E felony sentence length and "enhance the minimum sentence within the range for enhancement factors and then reduce the sentence within the range for the mitigating factors." Id. at 598; see Tenn. Code Ann. § 40-35-210(d),(e). In the instant case, the length of the defendant's sentence was not in issue because he agreed to a four-year sentence. The plea agreement left only the manner of service of the sentence in the discretion of the trial court. Tp determine the specific sentence and the appropriate combination of sentencing alternatives a trial court is under an obligation to consider evidence and information offered by the parties on the enhancement and mitigation factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114 as it deems them relevant to the confinement considerations in section 40-35-103(1). See State v. Batey, 35 S.W.3d 585, 588 (Tenn. Crim. App. 2000).

In determining whether to grant or deny probation, a trial court should consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the need for deterrence; and the best interests of the defendant and the public. Id. The trial court should also consider the defendant's potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-103(5); State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

The record reveals that the trial court carefully considered these factors together with the underlying facts of the case. Accordingly, our review is *de novo* accompanied by the presumption of correctness. In conducting our *de novo* review, this Court considers: (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any mitigating or statutory enhancement factors; (6) any statement that the defendant made in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; Ashby, 823 S.W.2d at 168.

Initially, we note that, although probation must be considered as an option for eligible defendants, no criminal defendant is automatically entitled to probation as a matter of law. See Tenn. Code Ann. § 40-35-303(b), Sentencing Commission Comments; State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). In the instant case, the defendant was eligible for probation because the offense of failing to appear is not specifically excluded by statute and the agreed sentence was less than eight years. See Tenn. Code Ann. § 40-35-303(a). However, he was not entitled to the statutory presumption that he was a favorable candidate for alternative sentencing because he was not an especially mitigated or standard offender. Id. § 40-35-102(6). Therefore, the defendant had the burden of demonstrating to the trial court that probation would serve the ends of justice and the best interests of both the public and himself. See Souder, 105 S.W.3d at 607.

Upon review of the record, this Court concludes that the trial court did not err in denying probation. The defendant's presentence report indicates a lengthy history of criminal conduct, including thirteen misdemeanor and twelve felony convictions. The trial court found that probation

would not effectively deter future criminal conduct of the defendant and that his potential for rehabilitation was slim, stating, "[the defendant] is not someone who the Court believes will ever follow the rules and regulations." We conclude that there is sufficient evidence in the record to support the trial court's findings and sentence of confinement.

Conclusion

Accordingly, we affirm the judgment of the trial court.

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J.C. McLIN, JUDGE